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CITATIONS

Statutes:	
Administrative Procedure Act, Section 6(a), 60 Stat. 240, 5 U.S.C. 1005(a)	2
Clayton Act, Section 2(d), 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13(d)	2, 3
Federal Trade Commission Act, Section 5, 38 Stat. 719, as amended, 56 Stat. 632, 72 Stat. 942, 15 U.S.C. 45	2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 736

J. WEINGARTEN, INC., PETITIONER

v.

THE FEDERAL TRADE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–18)[1] is reported at 336 F. 2d 687. The oral opinion and decision of the district court appears at Pet. App. 19–28, and the district court's written findings of fact and conclusions of law appear at Pet. App. 29–44.

[1] "Pet. App." refers to appendices A and B attached to the petition for a writ of certiorari herein, bearing consecutive page numbers followed by the letter "a" (which letter we omit in citations to these appendices).

"R." refers to the record certified by the district court to the court of appeals.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19) was entered on September 14, 1964. The petition for a writ of certiorari was filed on December 3, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was factual basis for the district court's finding that there had been unjustified delay in the Federal Trade Commission's conduct of its proceeding against petitioner.

2. Whether the Commission's order remanding the proceeding to the hearing examiner manifested prejudice against the petitioner.

3. Whether the Commission's order dismissing its proceedings subject to reopening if the district court's injunction order was reversed rendered moot the Commission's appeal from such order.

STATUTES INVOLVED

The pertinent portions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45); of Section 2(d) of the Clayton Act, 15 U.S.C. 13(d)); and of Section 6(a) of the Administrative Procedure Act, 5 U.S.C. 1005(a), are set forth in Appendix B to the petition.

STATEMENT

Petitioner seeks review of the judgment of the court of appeals (Pet. App. 19) reversing an order of the District Court for the Eastern District of Texas. The district court found that the Federal Trade Commis-

sion had failed to proceed with reasonable dispatch in its administrative proceedings against petitioner. It enjoined the Commission from remanding the proceedings for further hearings before the examiner and directed that within 30 days the agency should "make and issue a final order, disposing of said case" (Pet. App. 25, 45–46).

The Federal Trade Commission proceeding. On January 5, 1960, the Commission issued a complaint charging petitioner, *inter alia,* with receiving unlawful promotional allowances in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and Section 2(d) of the Robinson-Patman Act, 15 U.S.C. 13 (R. 46–49). Concurrently, eight proceedings were instituted against the principal suppliers alleged to have furnished the discriminatory allowances. The nine cases were assigned to the same hearing examiner (R. 59).

Hearings began on March 17, 1960. An interlocutory appeal to the Commission was taken by petitioner on May 23, 1960, and disposed of on September 9, 1960. Hearings were terminated on February 27, 1961, and were followed by the filing of proposed findings and briefs. During the time that the case was pending before the examiner, petitioner made no complaint of undue delay and did not request that the proceeding be expedited. The hearing examiner issued his initial decision on May 1, 1962, concluding that the violations charged had been established (R. 50–73).

After both parties had obtained extensions of time for filing briefs, oral argument was held before the

Commission on October 23, 1962. Five months later, on March 25, 1963, the Commission remanded the case to the hearing examiner for prompt taking of limited further evidence (Pet. App. 47–62).[2] The Commission stated that, while the solicitation and receipt of discriminatory promotional allowances by petitioner had been established (Pet. App. 52–53, 57–58), it wanted additional detail concerning the firms that competed with petitioner in selling goods of like grade. It noted that the record already contained "reliable and important information" on this issue but that this evidence was not sufficient due to the failure to elicit all the available data from the ten witnesses who testified for the distributors of goods in the area (Pet. App. 53–55, 57–58). The remand was ordered for the taking of this additional evidence and to enable the examiner to make more detailed findings of fact (Pet. App. 59–61). The Commission stated that since the remand was not for a retrial but for the taking of the limited additional evidence, it should require no more than five additional hearing days for each side, and directed that every effort be made to complete the reception of evidence within ninety days (Pet. App. 47).

On April 3, 1963, the examiner set the pre-hearing conference for April 16, 1963 (R. 74), on which date petitioner's counsel met with the examiner and com-

[2] By March 25, 1963 the Commission had already entered cease-and-desist orders in five of the proceedings against the suppliers (R. 58).

plaint counsel, and the examiner set dates of May 3 and May 17, 1963, for the trial briefs and set a further pre-hearing conference for May 21, 1963 (R. 76). No protest was entered by petitioner. On April 26, 1963, complaint counsel moved for the extension of the date for his trial brief to June 6, 1963, and for the elimination of the further pre-hearing conference (R. 77). Petitioner, on April 29, 1963, concurred in the extension of time requested, but objected to the elimination of the second pre-hearing conference (R. 78–79). On the same date, petitioner filed its complaint in the district court.[3]

Decision of the district court. Following oral argument and the receipt in evidence of petitioner's documentary exhibits, the district court on July 11, 1963, acting upon petitioner's "motion for injunction" *pendente lite,* found that the Commission's opinion evidenced some prejudice against the petitioner (Pet. App. 33), that there was little reason to think that additional evidence would be available to Commission counsel (Pet. App. 37–40), and that the Commission could itself hear whatever additional evidence there was without the delays of a hearing before the exam-

[3] The examiner did not grant the full time requested; he continued the time for trial briefs only to May 17 and 31, respectively, but granted petitioner's request for the retention of the further prehearing conference, which was set for June 4, 1963 (R. 80). However, on May 17, 1963, the examiner, by reason of the district court proceedings, revoked the order setting the above dates and did not continue with the remanded hearing.

iner (Pet. App. 35, 41). It concluded that the order to remand was "merely a vehicle to violate the provisions in Section 6(a) of the Administrative Procedure Act requiring reasonable dispatch" (Pet. App. 43a) and enjoined the remand, directing the Commission to enter a final order by August 13, 1963 (Pet. App. 45–46).

Pending appeal of the district court order, on August 13, 1963, the Commission issued an "Order Dismissing Complaint Without Prejudice * * * to the right of the Commission to reopen the matter and take such further action therein as the public interest may require if the aforesaid order of the District Court becomes ineffective as a matter of law." (Pet. App. 64.)

Decision of the court of appeals. The court of appeals reversed the judgment of the district court, with instructions to dissolve the injunction (Pet. App. 18). The court noted that the district court had acted in the absence of proof of the normal time necessary to conduct a similar administrative proceeding or of facts tending to show a dilatory attitude (Pet. App. 7). It rejected petitioner's contention that the Commission's conceded power to remand for the taking of additional evidence (Pet. App. 8) had been employed for the purpose of implementing an alleged prejudgment of petitioner's actions. With respect to the district court's prohibition of the use of an examiner to take whatever additional evidence was needed, the court of appeals held that there was "simply no basis for the District Judge taking it on himself to tell the Com-

mission how it should husband and deploy its resources and manpower" (Pet. App. 17).[4]

ARGUMENT

The decision of the court of appeals involves a factual issue relating only to one particular proceeding before the Federal Trade Commission.[5] The issue has been reviewed carefully and decided correctly by the court of appeals and does not merit review by this Court.

1. The court below correctly rejected petitioner's contention that the Commission did not proceed with sufficient dispatch, for nothing in petitioner's complaint or the record shows that any part of the period prior to the issuance of the remand order represented undue delay (R. 2–26). Indeed, petitioner was foreclosed from belatedly challenging the time that transpired in light of petitioner's own contributions to the delay and its failure to make seasonable protest by means of the available administrative remedies.

It is undisputed that the usual steps and procedures were followed, up to the time of the initial decision of the examiner. See Statement, *supra*, p. 3. During the period of less than six months after the hear-

[4] Petitioner's argument that the matter had become moot because of an order of the Commission entered on August 13, 1963, was similarly rejected by the court of appeals on the ground that the terms of the order itself showed the conditional nature of the dismissal. (Pet. App. 18, fn. 27; 64).

[5] We put to one side, for present purposes, the question whether a district court may in any circumstances intervene in an agency proceeding on the ground that it is not being conducted with dispatch.

ing examiner's initial decision, both petitioner and complaint counsel sought and obtained reasonable extensions of time to file briefs on appeal, briefs were filed, and the matter was heard with reasonable promptness by the Commission. The five months and two days interval between the argument and decision was not an unreasonable period for the Commission to take to study the record.

No more meritorious is the district court's suggestion that the Commission itself—presumably sitting en banc and hearing testimony of witnesses—could have adduced the additional evidence that it desired (Pet. App. 43). The Commission cannot reasonably be asked to set aside all other matters and for ten days conduct hearings of a type properly assigned to hearing examiners. Clearly this is a matter for the Commission's discretion, and the court of appeals aptly characterized the district court's suggestion as follows (Pet. App. 16–17a):

> Actually the District Judge, by permitting the Commission itself to take action within 30 days, recognized that it was proper for the Commission to obtain additional or clarifying evidence. But this prohibition on the use of an Examiner is an unwarranted intrusion into the administrative process by a Judge. * * * Congress recognizes that in administrative adjudication much must be left to hearing officers. * * * With the wide range of its statutory responsibilities, the number and complexities of

> the kind of matters it must handle [footnote omitted], there is simply no basis for the District Judge taking it on himself to tell the Commission how it should husband and deploy its resources and manpower.

2. The court of appeals' opinion demonstrates the insubstantiality of the charge that the Commission had prejudged the case against petitioner (Pet. App. 14–18).

As the court stated (Pet. App. 17–18):

> This is not a case like *Accardi* [*United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260] where the authority having the ultimate decision dictated the result to the body charged with the initial decision. Neither is it a case like *Amos Treat* [*Amos Treat & Co.* v. *S.E.C.*, 306 F. 2d 260 (C.A.D.C)] where one who actively engaged in the prosecution of a case at its initial stages became a judge of guilt or innocence at a later state. There is here no direction to convict—no intimation as to how the initial decision should be made. * * *

The court of appeals properly pointed out that neither the fact of remand itself nor the reasons given by the Commission for the remand showed prejudice, since (Pet. App. 15–16):

> [The courts] frequently remand both criminal and civil cases for a full or partial retrial. Such situations are, in effect, a holding that while the evidence was legally deficient, nevertheless

> the record indicates that more or better evidence is available on a new or further trial and a system of justice dedicated to the objective of finding the truth ought not to balk at affording an opportunity of "shoring up" the case.

3. Petitioner's contention that the case was rendered moot by the Commission's order of August 13, 1963, is without merit. The order was no unconditional closing of the matter but a dismissal of the proceeding "without prejudice to the right of the Commission to reopen the matter and take such further action therein as the public interest may require if the aforesaid [injunction] order of the District Court becomes ineffective as a matter of law" (Pet. App. 64). Upon the dissolution of the injunction the Commission became free to reopen and continue the proceedings.* As the court of appeals observed (Pet. App. 18, n. 27), "The conditional nature of the Commission's dismissal of the proceedings makes inapposite the authorities cited by [petitioner] in support of the contention that the matter is now moot."

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* When the Commission sought a stay of the district court order, pending the Commission's appeal thereof, it argued the possibility of mootness if the stay were not granted. But when the argument was not accepted, the Commission re-examined the alternatives and employed a different step—a conditional dismissal—which had not been considered in the argument concerning a stay.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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JANUARY 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965